

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

**ORIGINAL**  
DOCKET FILE COPY ORIGINAL

In the Matter of )

Implementation of Section 304 of the )  
Telecommunications Act of 1996 )

Commercial Availability of )  
Navigation Devices )

CS Docket No. 97-80

AUG 14 1998

**PETITION FOR RECONSIDERATION**

**TIME WARNER ENTERTAINMENT COMPANY, L.P.**

Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Suite 600  
Washington, D.C. 20036  
(202) 939-7900

Its Attorneys

Dated: August 14, 1998

No. of Copies rec'd  
List ABCDE

0411

## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY .....	i
I. INTRODUCTION .....	2
II. PHASE OUT OF INTEGRATED TERMINAL DEVICES .....	3
III. COMPATIBILITY ISSUES .....	9
IV. INTELLECTUAL PROPERTY CONCERNS .....	10
V. RIGHT TO ATTACH .....	12
VI. EXEMPTIONS FOR DBS AND OVS OPERATORS .....	15
VII. CONCLUSION .....	21

## SUMMARY

Time Warner seeks reconsideration of certain aspects of the Commission's Order implementing Section 629 of the Communications Act requiring the FCC to assure the commercial availability of "navigation devices" used by consumers to access services provided by MVPDs. Time Warner believes that the prohibition on offering integrated equipment after January 1, 2005 is unnecessary, will be costly to consumers, and will in the long run impede rather than facilitate the transition to digital video. As long as consumers have the option to purchase or lease component devices from unaffiliated retail vendors, there is no reason why they should not also have the option to obtain integrated devices from their MVPD. This is especially true with respect analog devices which have historically been offered on integrated basis, enjoy a large embedded base, and will eventually become obsolete as the transition to digital video is accomplished.

The Commission should clarify that Section 76.1204(b) should not be interpreted in a manner that mandates equipment portability and interoperability or which would freeze current state of technology. The Commission should also prohibit digital navigation devices from being marketed as "cable ready" or "cable compatible" which do not meet the OpenCable standard ultimately adopted by CableLabs.

Sections 76.1202 and 76.1204(c) should be expanded to apply to all equipment manufacturers and retailers in addition to MVPDs to ensure that such entities do not enter into arrangements with proprietary services to preclude or in any way disadvantage MVPD customers from receiving services offered by their MVPD. The Commission should also clarify that the disclosure obligations contained in Section 76.1205 do not require the release of competitively sensitive or proprietary technical information, but only those technical parameters which must be

incorporated into any commercially available navigation devices in order for an MVPD's services to be displayed on customer's TV set or other terminal device.

Given the broad right to attach adopted by the FCC, the Commission should clarify that the MVPDs are immune from liability to any third party where such attachments cause harm to the network or another user's equipment, or interfere with the transmission or reception of the authorized services another user. As MVPD's increasingly implement two-way services, which are more susceptible to interference from noise and other forms of signal and ingress, the potential for harmful interference caused by customer owned equipment cannot be ignored. The Commission should also indicate that "theft of service," as that term is used under Sections 76.1201 and 76.1209, includes the use of any device which defeats or assists in defeating copy protection techniques employed by program producers or copyright holders. FCC equipment certification should be subject to revocation for any navigation devices which have been found to have been used or designed to assist in the unauthorized reception of MVPD services, or which can be used to defeat or assist in defeating copy protection technology.

The exemption granted by the Commission for DBS is unnecessary given the fact that DSS equipment incorporates removable conditional access features and is commercially available. Thus, DSS equipment should be deemed to comply with the statute notwithstanding the fact that some security circuitry remains embedded in the commercially available device. Similarly, the FCC's conclusion that Section 629 does not apply to OVS operators ignores the fact that the Section applies to all MVPDs, unlike the provisions of the Act specifically referenced in Section 653. In any event, the Commission should not create a definition of an MVPD under Subpart P of its rules that is inconsistent with the definition of an MVPD contained in the Communications Act.

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the	)	
Telecommunications Act of 1996	)	
	)	CS Docket No. 97-80
Commercial Availability of	)	
Navigation Devices	)	
	)	

**PETITION FOR RECONSIDERATION**

Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys, hereby petitions the Commission to reconsider certain aspects and clarify other aspects of its decision released June 24, 1998 in the above-captioned rulemaking docket.<sup>1</sup> Time Warner is a partnership which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. Time Warner is comprised principally of three unincorporated divisions: Time Warner Cable, a nationwide operator of cable television systems; Home Box Office, an innovative provider of pay television programming services; and Warner Bros., a major producer of theatrical motion pictures and television programs. In addition, an affiliate of Time Warner holds a minority interest in a direct-to-home satellite programming service provider. Time Warner has actively participated in this docket, as evidenced by the comments and reply comments which it submitted in response to the Commission's Notice of

---

<sup>1</sup> Report and Order, CS Docket No. 97-80, 1998 FCC LEXIS 3052 (rel. June 24, 1998) ("Order").

Proposed Rulemaking.<sup>2</sup> As an MVPD, program supplier and producer, Time Warner is directly affected by the regulations adopted by the Commission in connection with its Order.

## I. INTRODUCTION

Throughout this proceeding, Time Warner has expressed its support for the Commission's efforts to implement Section 304 of the Telecommunications Act of 1996 ("1996 Act") which requires the FCC to assure the commercial availability of "navigation devices" used by consumers to access the services provided by multichannel video programming distributors ("MVPDs").<sup>3</sup> Despite the complexity of this task, Time Warner remains optimistic that the statutory goal of allowing a retail market to develop for video navigation devices and other non-security equipment located on the customer's premises can be achieved without jeopardizing the copyright interests of creative artists or undermining the signal security concerns of MVPDs.

While Time Warner generally supports the approach taken by Commission in resolving the many difficult issues raised in this proceeding, there are two specific areas, one involving the phase out of integrated analog terminal equipment and the other involving the exemptions granted to certain MVPDs, that warrant reconsideration. Furthermore, there are a number of areas involving the right to attach, compatibility, and intellectual property that would benefit from additional clarification.

---

<sup>2</sup> Notice of Proposed Rulemaking, CS Docket No.97-80, 62 Fed. Reg. 10011 (rel. February 20, 1997) ("NPRM").

<sup>3</sup> Pub. L. 104-104, 110 Stat. 56 (1996). Section 304 of the 1996 Act added Section 629 to the Communications Act of 1934 ("Communications Act"), 47 U.S.C. § 151 *et seq.*

## II. PHASE OUT OF INTEGRATED TERMINAL DEVICES

In its Order, the Commission requires a phase out of all devices combining security and non-security functions by January 1, 2005. After that date, MVPDs are prohibited from placing in service new navigation devices that perform both conditional access and other functions in a single integrated device.<sup>4</sup> This prohibition applies equally to analog and digital devices and is premised upon the Commission's finding that "certain parameters are necessary to ensure the movement of navigation devices toward a fully competitive market."<sup>5</sup>

As indicated its comments filed earlier in this proceeding, Time Warner supports the separation of security and non-security functions in home terminal equipment and has committed to making available component descrambling equipment to any of its customers who desire it. However, Time Warner believes that the blanket prohibition on offering integrated equipment after January 1, 2005 is unnecessary, will be costly to consumers and, insofar as analog equipment is concerned, will impede rather than facilitate the transition to digital video.

Initially, while Time Warner fully supports the separation of security and non-security functions to encourage the commercial availability of navigation devices, the mandated phase-out of integrated navigation devices offered by MVPDs is not required by Section 629. As long as consumers have the *option* to purchase or lease component devices, there is no reason they should not also have the option to obtain an integrated device from their MVPD. Consumer electronics manufacturers themselves provide many forms of integrated products in response to consumer

---

<sup>4</sup> Order at ¶¶3, 49, 69; newly adopted rule section 76.1204(a)(1).

<sup>5</sup> Order at ¶3.

needs and desires. It is wrong to prohibit only MVPDs from providing consumers the benefits product integration, especially where the only purpose is to reduce the likelihood that some consumers may prefer to lease equipment from their MVPD rather than purchase equipment at retail. As long as consumers are made aware that they have a choice of whether to lease equipment from their MVPD or purchase component equipment from retail sources, the commercial availability requirement of Section 629 is satisfied.

As Commissioner Powell correctly pointed out in his separate statement accompanying release of the Commission's Order:

I disagree with my colleagues' decision to prevent multichannel video providers from offering set-top boxes that integrate security within the box ... after year 2005.

\* \* \*

Section 629 clearly requires the Commission to "assure the commercial availability" of set-top boxes. It does not mandate in any way, shape or form that we guarantee that retail distribution win out over operator supplied alternatives or that we tip the balance in their favor.

\* \* \*

The real purpose of Section 629 was to ensure that consumers are not hostages to their cable operators and can go elsewhere, if they choose, to obtain set-top equipment....We accomplish that objective by mandating that separate security pods are available.

\* \* \*

The Commission, however, has not stopped there. It has gone beyond the target established in the statute and adopted a regulation that interferes with market choices for equipment design....The record developed in this case includes evidence that potential competitors to incumbent cable providers are developing integrated set-top boxes with unique functionalities as a way to enter the market. The decision of the majority today may well inhibit that development.<sup>6</sup>

---

<sup>6</sup> Order at separate Statement of Commissioner Michael Powell dissenting in part (June 11, 1998).



Simply put, the purposes of Section 629 can be served without requiring the complete phase out of integrated equipment after January 1, 2005.

The required phase-out of integrated equipment offered by MVPDs after January 1, 2005 ignores the consumer benefits of product integration. For example, integration of certain non-security functions in component security modules may be an economic way to ensure that the navigation device purchased by a consumer at retail does not become prematurely obsolete as the MVPD upgrades its network or provides new services. It may well be desirable to include additional memory or some other feature which can be added at little or no additional cost in a security module provided by the MVPD that will allow the consumer's existing navigation device to perform well in an upgraded network environment. Such an approach would help assure the backwards compatibility of both network components and commercially available video navigation devices. Indeed, the EIA-105 interface developed for analog equipment was specifically designed to allow the analog security module to support functions in addition to security. Accordingly, even if the Commission retains its requirement to phase out integrated home terminals, it should clarify that the phase out would not preclude MVPDs from providing security modules that also contain circuitry that allows the customer to receive and enjoy new functionalities and features which are provided as part of the MVPD's service and which may not be supported by a commercially available terminal device.

Even if the Commission retains the MVPD prohibition on offering integrated devices after a specified date, this prohibition should only apply to new digital or hybrid products and should not apply to analog only equipment. The Commission must recognize the substantial differences between analog and digital customer premises equipment. Analog equipment integrating security

functions has been in service for decades and represents a substantial embedded capital cost that must be recovered, while digital equipment is only now being deployed in significant numbers. Because of the large embedded base of analog video receivers which are not equipped with an EIA-105 interface, as well as the large embedded base of integrated analog navigation/security devices, the Commission should not prohibit MVPDs from continuing to offer integrated analog converter/descramblers.<sup>7</sup>

To the extent that the Commission seeks to facilitate creation of a market for component analog equipment despite the costs and customer confusion that the forced phase out of integrated analog equipment would entail, there are better ways to accomplish the desired result. Moreover, it is entirely unreasonable to place the entire burden of accomplishing this goal on cable operators without also requiring equipment manufacturers to shoulder reciprocal responsibilities. Rather than prohibiting MVPDs from offering integrated devices after January 1, 2005, the creation of a market for component devices can be better supported by requiring that analog television tuners incorporated into all 19" or larger screen televisions, VCRs and converters sold after July 1, 2000 be equipped with an analog decoder interface. Such a requirement will at least ensure that there will be a demand for the component descramblers which MVPDs are required to have on hand to provide to their customers. Hopefully, this demand will be sufficient to allow these components to be mass produced at lower cost, as well as ensure that equipment manufacturers

---

<sup>7</sup> The Commission appears to recognize that mandating separation of security and non-security functions in digital devices will be easier to accomplish and entail far less disruption than for analog devices due to the embedded base of integrated analog equipment. Order at ¶¶14-16. Yet it inexplicably treats both analog and digital equipment the same.

shoulder their fair share of the burdens imposed by section 629 of the Communications Act.<sup>8</sup> Moreover, the Commission must recognize that the obligation to meet the July 1, 2000 analog descrambler availability deadline cannot be achieved by cable operators unilaterally. Rather, given that proprietary analog scrambling techniques are controlled by two major equipment suppliers, their cooperation will be essential.<sup>9</sup>

Indeed, the Commission's required phase out of integrated analog equipment goes beyond proposals submitted by the consumer electronics industry which would have allowed cable operators to continue providing integrated analog devices in cases where a particular subscriber receives only analog services; where analog services provided in conjunction with digital services are not scrambled and can be displayed on existing circuitry; where analog services are delivered to the subscriber's terminal equipment "in the clear"; or where the MVPD gives its subscribers the option of receiving scrambled analog programming in a digital format as well.<sup>10</sup> It would be particularly wasteful and counterproductive to require cable operators to cease providing integrated analog set-top boxes in any system where all scrambled analog programming is also simulcast in

---

<sup>8</sup>Time Warner notes that these concerns are applicable to timing issues as they relate to analog equipment. Time Warner remains committed to meeting the schedule for deployment of digital security modules set forth in the June 4, 1998 letter from Neal M. Goldberg referenced in paragraph 78 of the Commission's Order.

<sup>9</sup>It should be noted that while the principal cable box suppliers have committed to make separate digital security modules available to the cable industry, there has been no similar commitment regarding separate analog security modules. *Id.* Moreover, while NCTA has advised the Commission regarding the detailed timetable of progress towards the goal of the OpenCable process relating to commercial availability of digital boxes, any such process relating to analog boxes has not achieved the same level of development and thus it may be impossible to achieve a similar deadline.

<sup>10</sup> Circuit City *ex parte* presentation, June 4, 1998.

a digital format. Subscribers to any such system can avoid leasing the analog box from the cable operator if they choose to purchase a commercially available digital box.

The greatest impediment facing the Commission, the broadcast industry, the cable industry, and consumer electronics industry in transitioning from an analog to digital terrestrial broadcasting is the substantial embedded base of analog television receivers found in American households. Consumers are simply not going to go out and replace all of their perfectly serviceable analog TV sets with expensive new digital sets by the date targeted for the return of the broadcast analog channels to the Commission.<sup>11</sup> Even if the cost of digital television sets were to come down by 90%, the fact that current analog receivers deployed in U.S. homes have useful lives of 5-15 years strongly suggests that the pace of digital television receiver deployment will be modest at best. Accordingly, the bulk of the viewing of digital television broadcasts can be expected to occur on existing analog receivers well into the next century, which will require the wide scale deployment of terminal equipment capable of receiving digital signals, whether delivered via over-the-air or via cable, and of translating those signals into a format suitable for display on analog receivers.

Time Warner suggests that the required phase out of integrated analog terminal equipment will have the unintended consequence of impeding and delaying a rapid transition to digital broadcasting. Consumers should not be encouraged to purchase analog terminal equipment that ultimately will have to be replaced with digital equipment. Rather, the commercial availability requirement of section 629 is better served by requiring MVPDs to make available component

---

<sup>11</sup> See Pub. L. No. 105-33, 111 Stat. 251 (1997) (amending Section 309(j) of the Communications Act).

analog descrambling devices to those customers who choose to purchase commercially available analog devices which are EIA-105 compliant, and encouraging consumers to purchase component digital or hybrid analog/digital devices that will not need to be replaced to accommodate the ongoing transition to digital television.

### **III. COMPATIBILITY ISSUES**

Section 76.1204(b) of the Commission's rules states that "[c]onditional access function equipment ... shall be designed to connect to and function with other navigation devices available through the use of a commonly used interface ...." Time Warner is concerned that the phrase "function with other navigation devices" may be interpreted to require that MVPD systems employing different technologies be capable of supporting all commercially available equipment. mandate that all equipment must be fully portable and interoperable with all MVPD systems. While the Order is clear that the Commission does not intend to mandate portability and interoperability, the ambiguity in the rule might nevertheless result in confusion.<sup>12</sup> Accordingly, the Commission should clarify that the phrase in section 76.1204(b) that requires conditional access equipment provided by MVPDs to "function with other navigation devices" means only that any security modules supplied by a cable operator will plug into and accommodate the standard interface being developed for that purpose by CableLabs. Similarly, the Commission should acknowledge that cable operators are free to use different security modules in different systems and that a navigation device which supports all services and features offered over a particular

---

<sup>12</sup> Order at ¶¶126-132.

system will not necessarily support all services and features provided over other systems operated by that operator or by other operators.

Finally, in order to avoid the type of consumer confusion which led to passage of the Consumer Electronics Compatibility provisions of Section 624A of the Communications Act, the Commission should prohibit any digital navigation device from being marketed as "cable ready" or "cable compatible" which does not meet the "OpenCable" standards ultimately adopted by CableLabs.

#### **IV. INTELLECTUAL PROPERTY CONCERNS**

Time Warner believes that clarification is necessary with respect to several provisions of the Commission's rules dealing with intellectual property. Section 76.1202 of the rules, adopted by the Commission pursuant to its Order, states that:

No multichannel video programming distributor shall by contract, agreement, patent right, intellectual property right or otherwise prevent navigation devices that do not perform conditional access or security functions from being made available to subscribers, retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator, subject to Section 76.1209.

A similar provision is contained in section 76.1204(c), which provides that:

No multichannel video programming distributor shall by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service.

Time Warner questions why the foregoing provisions are directed only to MVPDs. Clearly, consumer electronics equipment manufacturers and retailers themselves are in a far better position to thwart the commercial availability of navigation devices and determine what functions and features will be offered as part of any commercially available navigation device than the

MVPDs whose services those devices will receive. Indeed, Time Warner believes that the Commission's rules should not allow equipment manufactures to enter into arrangements with proprietary services that would preclude or in any way disadvantage an MVPD customer from receiving a competing service offered by the MVPD.

Time Warner has been an active participant in a number of inter-industry initiatives to develop interface standards that will allow consumers to purchase navigation devices that work with their MVPD service without compromising signal security and copyright protection concerns. Based on its extensive experience in this area, Time Warner can unequivocally state that the goals underlying Section 629 cannot be accomplished without the cooperation of all affected industries. It is simply unfair to single out MVPDs for prohibitions and regulatory burdens when it is the equipment manufacturers and consumer electronics firms who are responsible for designing and manufacturing the navigation devices which will eventually be commercially available. Accordingly, Time Warner believes that the foregoing rule sections should be expanded to apply to all consumer electronics equipment manufacturers and retailers in addition to MVPDs and should be rewritten to include a provision which would "prohibit any navigation device manufacturer from taking any action or using any contract, agreement, patent right, intellectual property right to prevent or hinder the manufacture or distribution of navigation devices that operate to receive all services and features offered by MVPD systems."

Time Warner also urges the Commission to clarify that the disclosure obligations contained in Section 76.1205 of the Commission's rules do not require the release of competitively sensitive or proprietary technical information concerning the services and products offered by an MVPD. The term "interface parameters" as used in that section must be interpreted to mean the type of

architectural and technical capabilities that will allow the device to be used with the MVPD system, regardless of the nature of services provided or type of security employed. For example, the types of interface specifications that would be appropriate for disclosure would include modulation, compression, amount and type of memory, operating system for running applications, in-band vs. out-of-band signaling capabilities, channel mapping and OSD support, bandwidth and other specifications that are expected to be included in the CableLabs OpenCable initiative. Interface parameters should not include proprietary technical information concerning signal security (which manufacturers of security modules may be unwilling to disclose even to cable operators or other MVPDs who purchase security modules) or other types of competitively sensitive information regarding the content of MVPD services. In other words, MVPDs should be under no obligation to disclose any proprietary intellectual property, software or other information content which may be delivered over the MVPD's system. Rather, the MVPD should only be required to disclose the technical parameters which must be incorporated into any commercially available navigation device in order for a cable operator's content to be displayed on a subscriber's TV set or other terminal device.

## **V. RIGHT TO ATTACH**

Pursuant to the regulations adopted by the Commission to implement Section 629, MVPD subscribers are given the right to attach their own terminal equipment to the MVPD network so long as such equipment does not cause harm to the network, interfere with the communications of other subscribers, and is not used to receive services which are unauthorized. Time Warner acknowledges that the commercial availability of terminal equipment will mean little if MVPDs



are able to prevent customers from attaching that equipment to their networks. However, additional clarification of certain issues involving the right to attach would be helpful.

Initially, given the broad right to attach adopted by the FCC, the Commission should clarify that MVPDs are immune from liability to any third party where such attachments cause harm to the network or another user's equipment, or where they interfere with the transmission or reception of the authorized services of another user. Where customers are given a right to attach their own equipment to an MVPD's network, the MVPD may not be held responsible for any harm or loss of service that such attachments may cause, especially in cases where there is no network malfunction. Even though MVPDs are permitted to make available a list of devices which are known to cause harm to the network, it is possible for the attachment of particular device to take place before it is known to cause harm or interfere with the authorized service of other customers. Such situations would be increasingly likely if the Commission's rules are successful in stimulating the development of a consumer market for terminal equipment.

Furthermore, even in cases where a device is known to cause harm or interference, the MVPD will rarely, if ever, be in a position to disconnect the offending equipment until after the harm has occurred. Even then, locating the exact source of the harmful attachment will not always be easy. As operators increasingly implement two-way services, such as Internet access or IP telephony, which are more susceptible to interference from noise and other forms of signal ingress and where the communications in question may be more sensitive in nature, the potential for harmful interference problems to arise can be expected to increase rather than decrease, particularly from the attachment of a device capable of introducing upstream transmissions on the

cable network. Accordingly, MVPDs must be insulated from all liability to their customers resulting from harmful attachments which they are powerless to prevent.

Section 76.1201 of the Commission's rules excludes from the right to attach "such devices [as] may be used to assist or are intended or designed to assist in the unauthorized receipt of service."<sup>13</sup> Similarly, Section 76.1209 of the Commission's rules states that no provision contained in Subpart P of the rules should be construed "to authorize or justify any use, manufacture or importation of equipment that would violate ... any ... provision of law intended to preclude the unauthorized reception of multichannel video programming service."<sup>14</sup> As indicated in the comments and reply comments filed by Time Warner in this proceeding, signal piracy and theft of service remain among the most costly problems faced by program producers and MVPDs alike, costing the cable industry alone an estimated \$5.2 billion annually, or approximately 20 percent of the industry's annual revenue.<sup>15/</sup> While the foregoing new provisions will undoubtedly prove helpful in the ongoing fight to curb signal piracy, Time Warner believes that certain additional clarifications are warranted.

The FCC should clarify that "theft of service," as that term is used under Sections 76.1201 and 76.1209, includes any device which can be used to defeat or assist in defeating copy protection techniques employed by program producers or copyright holders. Copy protection is critical to protect the rights of copyright holders and creative artists, particularly as the world

---

<sup>13</sup> FCC rule section 76.1201.

<sup>14</sup> FCC rule section 76.1209.

<sup>15</sup>"NCTA Estimates Loss to Piracy at \$5.2B," Multichannel News (April 14, 1997) at 10. This estimate is based on data collected during 1995 and the first six months of 1996.

moves from an analog environment to a digital environment where the possibility of creating unlimited perfect copies from a single source exists. Much work has been accomplished on the development of an inter-industry agreement to incorporate copy protection into DVD players and other digital devices which are or will be available commercially. Time Warner believes that copy protection must be incorporated into any standard developed for commercially available digital terminal devices and that the Commission must take an active role to ensure that the integrity of copyright protection technology is maintained. To this end, the Commission should revoke the FCC equipment certification granted to any navigation device which has been found to have been used or designed to assist in the unauthorized reception of cable services, or which can be used to defeat or assist in defeating copy protection technology.

#### **VI. EXEMPTIONS FOR DBS AND OVS OPERATORS**

In its Order, the Commission determined that its regulations to implement Section 629 would not apply to DBS and OVS operators. With respect to DBS, the Commission based the exemption on "differences in the marketplace for DBS equipment, where devices are available at retail and offer consumers a choice, as compared to equipment for other MVPD services ...."<sup>16</sup> With respect to OVS, the Commission determined that Section 653(c) of the Communications Act governing OVS prohibits application of Section 629 to OVS operators.<sup>17</sup> Time Warner believes that this analysis is faulty.

---

<sup>16</sup> Order at ¶64.

<sup>17</sup> Order at ¶23.

Section 629 of the Communications Act requires the Commission to adopt regulations assuring the commercial availability of navigation devices used to receive services from *all* MVPDs. Section 629 does not grant the Commission any authority to pick and choose from among various types of MVPDs in applying the standards set pursuant to Section 629. In describing the goals underlying Section 629, Congress stated that:

Competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among *telecommunications subscription services arriving by various distribution sources*.<sup>18/</sup>

The express statutory purpose of providing consumers with the benefits to be reaped from a competitive environment for video navigation devices and to ensure that consumers have choices among "telecommunications subscription services arriving by various distribution sources" would be undermined by exempting the equipment utilized to obtain multichannel video programming service from certain types of MVPDs but not others.

The statutory language of Section 629 does not specifically list or limit the types of multichannel video programming systems to which the section applies, and indeed, does not define the term "multichannel video programming systems" at all. However, Section 602(13) of the Communications Act defines "multichannel video programming distributor" as:

a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.<sup>19/</sup>

---

<sup>18</sup>H.R. Rep. No. 204, 104th Cong., 1st Sess. 112 (1995) (emphasis added).

<sup>19</sup>47 U.S.C. § 522(13).

"Multichannel video programming distributors" are, of course, the entities that operate and distribute the programming over the "multichannel video programming systems" to which Section 629 applies, and thus, are the entities covered by Section 629. The statutory MVPD definition contained in Section 602(13) of the Communications Act lists certain types of MVPDs as examples, but is clear that the list is not intended to be exhaustive. The litmus test for defining MVPD is "a person . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming."<sup>20</sup> Section 629 thus encompasses a wide range of video distribution systems, *including, but not limited to*, cable television systems, high and medium power DBS and satellite service systems (C-band, Ku band FSS, and Ku band BSS), satellite master antenna systems, wireless cable systems (e.g., multichannel multipoint distribution service, instructional television fixed service, and local multipoint distribution service), and open video systems ("OVS"). All of these entities provide paying subscribers with "multiple channels of video programming," thus falling within the express statutory definition of an MVPD.

Section 76.1204(a)(2) of the Commission's rules creates an exemption for DBS from the requirement to separate conditional access functions from other functions in navigation devices. Time Warner believes that this exemption is unnecessary since DBS services using smart card technology, such as DSS, should be deemed to have met the commercial availability requirement regardless of the fact that the DSS navigation device ("IRD") which is available commercially contains some security circuitry. While Time Warner supports the separation of security from non-security functions in order to achieve the commercial availability of navigation devices, the

---

<sup>20</sup> Id.

Commission should be mindful that the statute does not require complete separation of all security circuitry from navigation devices, only that such navigation devices be commercially available from sources unaffiliated with the MVPD service provider. In the case of DSS equipment, this requirement has been met since IRDs are manufactured under such brands as RCA, Philips and Sony and are available from a variety of consumer electronics retail outlets such as Best Buy, Circuit City, Radio Shack and the like. Clearly, the literal requirements of, and Congressional purposes underlying, Section 629 have been met even though some of the security circuitry remains embedded in these commercially available devices.

The Commission itself recognizes that the "smart card" approach embodied by the NRSS-A (EIA-679) standard currently in development represents an acceptable method of separating conditional access from other functions in navigation devices.<sup>21</sup> Accordingly, rather than creating an exemption for DBS and DTH services, the Commission should clarify its rules to require the phase out of only those integrated devices in which *all* conditional access and non-security functions are included a single device. Devices employing a smart card or similar approach whereby some conditional access circuitry remains embedded in a commercially available navigation devices while other security circuitry is external should not be subject to the phase out requirement, regardless of whether that equipment is used to receive cable, DBS or other MVPD services. Such an approach would be consistent with the Commission's recognition that some security circuitry embedded in a commercially available navigation devices may perform necessary

---

<sup>21</sup> Order at ¶75.

and indeed desirable functions such as copy protection or parental control.<sup>22</sup> Furthermore, such an approach would allow MVPDs to offer additional features and functionalities through the component security module as new services are offered, thus assuring backwards compatibility of the MVPD network with customer owned equipment purchased commercially and avoid rendering such equipment obsolete as systems are upgraded.

In its Order, the Commission has concluded that Section 629 does not apply to OVS operators. The Commission reaches this conclusion by a rather circuitous route. The Commission reasons that because Section 653(c)(1) of the Communications Act provides that certain specific provisions of Title VI apply to OVS operators certified under Section 653(a) of the Communications Act, but does not list Section 629 as one of the statutory sections specifically applicable to OVS operators, Congress intended to exempt OVS systems from the reach of section 629.<sup>23</sup>

Such an analysis is not at all compelling in light of the fact that section 653 is intended to exempt OVS operators from regulation *as cable systems* except for certain narrowly defined circumstances. This is made clear by section 653(a) which states that the purpose of the statutory provision is to ensue that as long as certain conditions are met, "[a]n operator of an open video system shall qualify for *reduced* regulatory burdens ...."<sup>24</sup> Section 653(c)(1) makes clear that those reduced burden are regulatory obligations imposed on cable operators specifically.

---

<sup>22</sup> Order at ¶63.

<sup>23</sup> Order at ¶23.

<sup>24</sup> 47 U.S.C. §573(a) (emphasis supplied).

(1) IN GENERAL- Any provision *that applies to a cable operator* under--

(A) sections 613 (other than subsection (a) thereof), 616, 623(f), 628, 631, and 634 of this title, shall apply,

(B) sections 611, 614, and 615 of this title, and section 325 of title III, shall apply in accordance with the regulations prescribed under paragraph (2), and

(C) sections 612 and 617, and parts III and IV (other than sections 623(f), 628, 631, and 634), of this title shall not apply, to any operator of an open video system for which the Commission has approved a certification under this section.<sup>25</sup>

It is significant that all of the provisions cited in section 653(c)(1) above, by their own terms, make reference and are applicable exclusively to cable operators or cable systems, not to MVPDs generally. In contrast, section 629 is not a provision applicable by its terms to "cable operators," but rather is applicable generally to all multichannel video programming systems. The Commission's analysis simply ignores how broadly Congress has defined an MVPD. Moreover, its analysis ignores the fact that the regulations which the Commission is required to adopt pursuant to Section 629 are aimed primarily at bestowing *on consumers* the benefits of a competitive market for the provision of video navigation devices. Accordingly, there is no basis whatsoever to exclude OVS operators and/or their programmers from regulations intended to apply to all MVPDs and to benefit consumers by fostering a competitive market in the provision of such devices.

As indicated above, Congress defined an MVPD broadly to include all entities who make available for purchase by subscribers or customers multiple channels of video programming. This

---

<sup>25</sup> 47 U.S.C. §573(c)(1) (emphasis supplied).



definition clearly encompasses OVS systems. The Commission, however, correctly noting that Congress did not define the term multichannel video programming system, attempts to circumvent the broad reach of section 629 by adopting its own definition of a multichannel video programming system which excludes the facilities of an OVS system. Time Warner urges the Commission to reconsider this slight of hand. The term "multichannel video program distributor" as defined by Congress in the Communications Act is a term of art which is used in many franchise agreements, ordinances and other documents. The Commission's attempt to redefine that term of art to exclude OVS operators for purposes of its rules implementing Section 629 creates a conflict with the statutory definition and injects ambiguity into the interpretation of various existing documents and ordinances which would not otherwise exist. Accordingly, the Commission should eliminate the OVS exclusion from the definition of multichannel video programming system contained in section 76.1200(a) of its rules. Should the Commission continue to believe that Section 629 cannot be applied to OVS operators and feel the need to make an affirmative statement in its rules, it should simply create an outright exclusion for OVS in its navigation device rules rather than adopting a definition which suggests that OVS operators are not MVPDs and which is therefore inconsistent with the definition of an MVPD contained in the Communications Act.

## **VII. CONCLUSION**

For the foregoing reasons, Time Warner respectfully requests that the Commission grant partial reconsideration of its Order insofar as it mandates a complete phase out of integrated analog navigation devices and creates unwarranted or unnecessary exemptions for certain classes of MVPDs and not others. Additionally, Time Warner requests that the Commission modify its